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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-446

HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

v.

THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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HAMMOND LEAD PRODUCTS, INC., *Petitioner,*

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THE UNITED STATES (Ralph Valls, Party-in-Interest), *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner, Hammond Lead Products, Inc., petitions for a writ of certiorari to review the judgment rendered herein on April 22, 1971, by the United States Court of Customs and Patent Appeals.

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals, reported at 58 C.C.P.A. ., C.A.D. 1017, 440 F.2d 1024, appears as Appendix A to this Petition. The two opinions of the United States Customs Court, reported at 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp. 460 and 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533, appear as Appendix B and C respectively.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals for which review is sought was entered on April 22, 1971. A Petition for Rehearing was denied on July 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256.

QUESTION PRESENTED

Does the United States Customs Court possess jurisdiction pursuant to Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b),[1] to entertain a protest by an American manufacturer, producer, or wholesaler which complains of the failure of the Secretary of the Treasury to assess a countervailing duty pursuant to the mandate found in Section 303, Tariff Act of 1930, 19 U.S.C. § 1303?

STATUTORY PROVISIONS INVOLVED

The statutes involved are:

Item 473.52, TSUS (19 U.S.C. § 1202):

> Pigments (except pigments, in dry form, described in the foregoing provisions of this subpart):
>
> * * * *
>
> Containing Lead:
>
> * * * *
>
> Item 473.52 Litharge ..... 1.25¢ per lb.

Section 303, Tariff Act of 1930, 19 U.S.C. § 1303:

Countervailing duties

> Whenever any country, dependency, colony, province, or other political subdivision of govern-

[1] All references to the Tariff Act of 1930 refer to its provisions prior to its amendment by *The Customs Court Act of 1970*, P.L. 91-271, 84 Stat. 274, Approved June 2, 1970.

ment, person, partnership, association, cartel, or corporation shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this chapter, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this chapter, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The Secretary of the Treasury shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated. The Secretary of the Treasury shall make all regulations he may deem necessary for the identification of such articles and merchandise and for the assessment and collection of such additional duties. June 17, 1930, c. 497, Title III § 303, 46 Stat. 687.

Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b):

Classification

(b) The Secretary of the Treasury shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification of, and the rate of duty, if any, imposed upon, designated imported merchandise of a class or kind manufactured, produced, or sold at whole-

sale by him. If such manufacturer, producer, or wholesaler believes that the proper rate of duty is not being assessed, he may file a complaint with the Secretary, setting forth a description of the merchandise, the classification, and the rate or rates of duty he believes proper, and the reasons for his belief. If the Secretary decides that the classification of, or rate of duty assessed upon, the merchandise is not correct, he shall notify the collectors as to the proper classification and rate of duty and shall so inform the complainant, and such rate of duty shall be assessed upon all such merchandise entered for consumption or withdrawn from warehouse for consumption after thirty days after the date such notice to the collectors is published in the weekly Treasury Decisions. If the Secretary decides that the classification and rate of duty are correct, he shall so inform the complainant. If dissatisfied with the decision of the Secretary, the complainant may file with the Secretary, not later than thirty days after the date of such decision, notice that he desires to protest the classification of, or rate of duty assessed upon, the merchandise. Upon receipt of such notice from the complainant, the Secretary shall cause publication to be made of his decision as to the proper classification and rate of duty and of the complainant's desire to protest, and shall thereafter furnish the complainant with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at the port of entry designated by the complainant in his notice of desire to protest, as will enable the complainant to protest the classification of, or rate of duty imposed upon, such merchandise in the liquidation of such an entry at such port. The Secretary shall direct the collector at such port to notify such complainant immediately when the first of such entries is liquidated. Within thirty days after the date of mailing to the com-

plainant of notice of such liquidation, the complainant may file with the collector at such port a protest in writing setting forth a description of the merchandise and the classification and rate of duty he believes proper. Notwithstanding such protest is filed, merchandise of the character covered by the published decision of the Secretary when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, rendered under the provisions of subsection (c) of this section, not in harmony with the published decision of the Secretary, shall be classified and the entries liquidated in accordance with such decision of the Secretary, and, except as otherwise provided in this chapter, the liquidations of such entries shall be final and conclusive upon all parties. If the protest of the complainant is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of such court decision, shall be subject to classification and assessment of duty in accordance with the final judicial decision on the complainant's protest, and the liquidation of entries covering such merchandise so entered or withdrawn shall be suspended until final disposition is made of such protest, whereupon such entries shall be liquidated, or if necessary, reliquidated in accordance with such final decision. June 17, 1930, c. 497, Title IV, 46 Stat. 735; June 25, 1938, c. 679, § 17(a), 52 Stat. 1084; June 25, 1948, c. 646, § 39, 62 Stat. 992.

STATEMENT OF THE CASE

Petitioner is a domestic manufacturer of simple lead products, the predominant one being litharge. Litharge is a lead oxide containing ninety-three percent lead metal and seven percent oxygen. Its fabrication is essentially one of furnacing refined lead and its primary uses are in lead storage batteries and in the chemical and pigment industries.

Throughout the 1960's Petitioner was active in efforts designed to convince the Treasury Department, and its agent the Bureau of Customs, that litharge exported from Mexico was the recipient of a bounty or grant and that a countervailing duty was required to be imposed pursuant to Section 303, Tariff Act of 1930, 19 U.S.C. § 1303. Section 303, which has been a part of our customs laws in substantially its present form since Section 5 of the Tariff Act of 1897, 30 Stat. 205, provides that all dutiable articles which receive a bounty or grant by a foreign government upon their manufacture, production, or export shall be met at our borders with an additional duty—countervailing duty—equal to the amount of the bounty or grant. This provision and its two operative terms, bounty and grant, have twice been subjected to analysis by this Court, *Downs* v. *United States,* 187 U.S. 496 (1903), and *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919), and on various occasions by the customs courts. *Energetic Worsted Corp.* v. *United States,* 51 Cust. Ct. 55, C.D. 2413, 224 F. Supp. 606 (1963), *rev'd,* 53 C.C.P.A. 36, C.A.D. 874 (1966); *Heathcoat Co.* v. *United States,* 34 C.C.P.A. 122, C.A.D. 354 (1947); *Robert E. Miller and Co.* v. *United States,* 34 C.C.P.A. 101, C.A.D. 349 (1946); *Balfour, Guthrie & Co.* v. *United States,* 31 C.C.P.A. 63, C.A.D. 249,

136 F.2d 1019 (1943); *V. Mueller & Co.* v. *United States,* 28 C.C.P.A. 249, C.A.D. 152, 115 F.2d 354 (1940); *F. W. Woolworth Co.* v. *United States,* 28 C.C.P.A. 20, C.A.D. 151, 115 F.2d 348 (1940); *Case and Co.* v. *United States,* 3 Cust. Ct. 310, C.D. 264 (1939); *Franklin Sugar Refining Co.* v. *United States,* 178 Fed. 743 (E. D. Pa. 1910); *United States* v. *Hill Bros. Co.,* 107 Fed. 107 (2d Cir., 1901).

Briefly stated, Petitioner maintained that the Mexican Government subsidized the Mexican litharge industry. Refined lead, the raw material in the manufacture of litharge, bears an acquisition cost to the litharge producer which generally amounts to nearly eighty percent of the total packaged selling price of litharge. Petitioner maintained that through an established formula the Mexican Government required the two smelters of refined lead in Mexico to sell their product domestically at a price substantially below the international price for refined lead. The result of this practice enabled the litharge manufacturer to export his product to the United States at prices noncompetitive with that quoted by producers of litharge in the United States.

Following repeated failures to obtain the imposition of a countervailing duty by the Treasury Department, Petitioner, on May 2, 1967, filed a complaint with the Secretary under Section 516(b), Tariff Act of 1930, 19 U.S.C. § 1516(b), claiming that litharge imported from Mexico should be classified under Section 303 and accordingly assessed with a countervailing duty. Section 516(b) details an administrative remedy culminating in the United States Customs Court whereby an American manufacturer, producer, or wholesaler may protest the classification and rate of

duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. Pursuant to Section 516(b), the Commissioner of Customs notified Petitioner on May 5, 1967, that the classification and rate of duty on litharge were correct and that countervailing duties were inapplicable. Thereafter, on May 9, 1967, Petitioner notified the Secretary of the Treasury that he intended to protest the classification and rate of duty assessed upon litharge imported from Mexico. The Secretary, pursuant to the Section, published its decision as to the classication and rate of duty and Petitioner's desire to protest in T.D. 67-142. On August 21, 1967, Petitioner was notified by the District Director of Customs, Laredo, Texas, of the entry on August 10, 1967, of 100,200 pounds of litharge and of its liquidation on August 21, 1967. Thereafter, on September 18, 1967, Petitioner protested the classification and rate of duty on the referenced liquidation. The protest was forwarded to the United States Customs Court on October 30, 1967, and docketed as Protest No. 67/77548.

United States Customs Court

On March 28, 1968 and April 12, 1968, the United States and the Party-in-Interest, respectively, filed motions to dismiss the docketed protest for lack of subject matter jurisdiction in the United States Customs Court. The United States pointed out that Section 516(b) limits American manufacturer's protests to the questions of the classification and/or rate of duty imposed upon the designated merchandise. The United States argued that the only rate of duty applicable to litharge was Item 473.52, T.S.U.S., and an additional

duty in the nature of a countervailing duty only affected the total amount of duty assessed, not its rate. The United States cited *E. C. Miller Cedar Lumber Co.* v. *United States,* 24 C.C.P.A. 272, T.D. 48701, 86 F2d 429 (1936), for the proposition that the amount of duty was an issue distinct from the question of rate of duty, and was outside the scope of Section 516(b).

Party-in-Interest repeated the argument of the United States that countervailing duties referred to the amount of duty to be assessed, and was outside Section 516(b) under the rule of *E. C. Miller, supra.* Party-in-Interest further argued that negative determinations of the Secretary of the Treasury were not reviewable under *Mills & Gibb* v. *United States,* 8 Ct. Cust. Appls. 31, T.D. 37164 (1917), and the alleged inconsistency between the implementing regulations issued under Section 303, 19 C.F.R. § 16.24, and Section 516(b) evidenced that countervailing duty protests were outside the reviewing statute.

Following an oral argument on the jurisdictional question, the United States Customs Court, First Division, on September 11, 1968, unanimously denied both motions to dismiss. 61 Cust. Ct. 137, C.D. 3552, 289 F. Supp. 533 (Appendix C). The court held that *E. C. Miller, supra,* was inapplicable to the issue presently before it. *E. C. Miller,* the court held, pointed out that the total amount of duty assessed is the product of the rate of duty times the quantum of merchandise (also times the value where the duty is ad valorem). Rate of duty, as used in Section 516(b), does not include questions concerning the quantum of merchandise and its indirect effect on the amount of duty to be assessed. The court held that countervailing

duties represented a rate to be applied against a specified quantity, and the rule of *E. C. Miller* had no application to the subject protest. The court held that *Mills & Gibb* v. *United States, supra,* dealt with a statute other than Section 516(b), a statute which limited review to decisions of a collector. Thus there was no jurisdiction when the protest was directed to an area where only the Secretary of the Treasury, and not the collector, possessed decision-making authority. *Mills & Gibb* was inapplicable, of course, since Section 516(b) permitted review of decisions of the Secretary of the Treasury. The court also failed to find any inconsistency between the administrative regulations implementing Section 303 and Section 516(b), and dismissed as "meaningless", in any event, the effect of such an inconsistency upon the congressional remedy found in Section 516(b).

The court held that *Bradford Co. and U.S.* v. *American Lithographic Co.,* 12 Ct. Cust. Appls. 318, T.D. 40318 (1924), was "determinative of the jurisdictional issue." In *Bradford,* an American manufacturer protested under Section 516(b), Tariff Act of 1922,[2] that certain merchandise should be assessed with an additional duty equal to ten percent of its appraised value, because such merchandise was not marked, stamped, branded or labeled, so as to indicate the country of origin as required by Section 304(a), Tariff Act of 1922—the predecessor to Section 304, Tariff Act of 1930. The Appellants in *Bradford* contended that Section 304(a) did not involve issues of classification or rate of duty, relying upon argu-

[2] As far as the present issue is concerned, Section 516(b), Tariff Act of 1922, was essentially similar to Section 516(b), Tariff Act of 1930.

ments remarkably similar to Respondents here. The Court of Customs Appeals, in *Bradford,* defined classification in the following fashion:

> Classification of imported merchandise is the process or act of grouping, or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial designation, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, the purpose of which is to determine what provisions of the tariff laws are applicable thereto. 12 Ct. Cust. Appls. at 323.

Bradford, in referring to rate of duty, commented that "We think that a proper interpretation of the phrase, 'rate of duty,' as it is used in section 516(b), *supra,* means the amount of duty assessed against imported merchandise, resulting in the first instance, from the classification thereof." 12 Ct. Cust. Appls. at 323.

The Customs Court held that Section 304(a), like Section 303, required the imposition of an additional duty, added upon the existing statutory duty, should a specific condition exist. In Section 304(a), the condition is the improper marking of the goods with the country of origin; in Section 303, the condition includes the bestowal of a bounty or grant by a foreign government. Determination of the applicability of the condition, and, therefore, the applicability of the particular Section, is classification. The additional duties to be imposed upon an affirmative finding of the existence of the requisite condition is a rate of duty, a monetary assessment commanded by Congress with the same certitude as the rates contained in the Tariff Schedules.

The court also referred to *North American Cement Corp.* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), where the District of Columbia Circuit Court held that Section 516(b) was the proper vehicle for an American manufacturer to challenge the failure of the Secretary of the Treasury to find that cement imported from Norway was being sold in this country at less than fair value, and the resulting failure to impose a special dumping duty as required by the Anti-dumping Act of 1921. Finally, the court was impressed with *Feltex Corp.* v. *Dutchess Hat Works,* 21 C.C.P.A. 463, T.D. 46597, 71 F.2d 322 (1934), for the rule that American manufacturers under Section 516(b) may contest classification and rate of duty of imported merchandise to the same extent as importers might do under Section 514, providing for protests by importers against decisions of the collector. This pronouncement bore particular relevance in light of the fact that importers have always been deemed entitled to contest in the customs courts the assessment of countervailing duties.[8]

Following the denial of the motions to dismiss, trial on the merits was held on January 29, 1969. By way of a post-trial brief on the merits, the United States again repeated its contentions of lack of jurisdiction in the United States Customs Court. On November 7, 1969, the United States Customs Court, First Division, unanimously rejected the repeated jurisdictional argument of the United States, and held that the fiscal activities of the Mexican Government with respect to refined lead and litharge amounted to the bestowal of a bounty or grant on the production and exportation of litharge, 63 Cust. Ct. 316, C.D. 3915, 306 F. Supp.

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[8] *See,* decisions cited on pages 6-7, *supra.*

460 (Appendix B). The court directed the reliquidation of the entry by adding, pursuant to Section 303, an additional duty equal to the amount, as found by the Secretary of the Treasury, of the bounty or grant bestowed by the Mexican Government. On January 5, 1970, both the United States and the Party-in-Interest petitioned for review to the United States Court of Customs and Patent Appeals.

United States Court of Customs and Patent Appeals

On appeal, the United States confined itself to the decision of the customs court on the merits, and did not refer to the jurisdictional arguments which it had raised below. Party-in-Interest, on the other hand, sought review on both the jurisdictional question and on the merits. Party-in-Interest essentially repeated the same contention which it had previously made; that is, that the additional duty called for by Section 303 was not a rate of duty, but only referred to the amount of duty, citing *E. C. Miller Cedar Lumber Co.* v. *United States, supra.* Party-in-Interest also sought to limit *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* to its own facts, and not as a precedent for the rule that classification is the determination of what provisions of the customs laws apply to a specific entry.

On April 22, 1971, the United States Court of Customs and Patent Appeals held that the United States Customs Court lacked jurisdiction over the protest and, therefore, reversed the lower court's decision and judgment.[4] 58 C.C.P.A. ——, C.A.D. 1017, 440 F.2d 1024 (Appendix A) The ratio decidendi of the appellate court below was utterly unique from any

[4] Two of the five judges dissented, holding that they would affirm the decision below not only as to jurisdiction but also on the merits.

of the jurisdictional arguments previously submitted by the several parties. The court recognized that Section 516(b) was expressly limited to matters of classification and/or rate of duty, whereas Section 514, Tariff Act of 1930, the provision enabling protests by importers, permitted review of "all decisions of the collector . . . as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) . . . ." The court concluded that there must be some customs exactions within Section 514 and outside of Section 516(b). The court concluded that "customs penalties, as a class, are 'exactions' included in Section 514 and left out of Section 516(b)" —citing no authority. The syllogism was completed by the court's finding that a countervailing duty called for by Section 303 was a penalty—citing no authority—and, therefore, outside the scope of Section 516(b).

The appellate court below catapulted the otherwise insuperable logic of *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* "on the hypothesis that the ten percent marking duty there involved was not regarded as penal." The court sought to delimit the meaning of "classification" to the "physical characteristics of the imports"—a tacit overruling of *Bradford's* definition of classification which has been uniformly relied upon in subsequent customs decisions. *Diamond Match Co.* v. *United States,* 45 Cust. Ct. 198, C.D. 2223, 181 F. Supp. 952 (1960); *Star-Kist Foods, Inc.* v. *United States,* 37 Cust Ct. 171, C.D. 1819, 150 F. Supp. 737 (1957); *E. C Miller Cedar Lumber Co.* v. *United States, supra.* A petition for rehearing was denied by the appellate court on July 1, 1971.[5]

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[5] Judge Almond would have granted the petition.

REASONS FOR GRANTING THE WRIT

"This is a novel question, so far as we know, and a momentous one . . . ." Although this description was made as a prefatory comment to the appellate decision below, it serves as a most suitable means for introducing this petition. The effect of the decision below is to foreclose judicial review to American industry of decisions of the Secretary of the Treasury as to the applicability of countervailing duties under Section 303, Tariff Act of 1930. Furthermore, both the logic and the dicta of the decision below require its extension beyond the countervailing duty area, and its presence will be certainly apparent in antidumping litigation. 19 U.S.C. § 160 *et seq.*

With the modern trend "toward enlargement of the class of people who may protest administrative action," *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970), particular scrutiny must be focused upon a decision which precludes review to a class as large as the "American manufacturer, producer or wholesaler." This is particularly true where the court denies review despite a lack of congressional expression in favor of foreclosure [6] and in the very face of a statute expressly extending review to the class foreclosed. In 1922 Congress enacted a statute permitting American manufacturers "the right of protest against the rate or amount of duty as being too low" and allowing them to be "heard upon matters of value and classification of imported merchandise directly affecting their in-

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[6] When Congress has desired to preclude Section 516(b) review from a particular rate-making function, it has done so. *See*, Section 2 of the Trade Agreement Act of 1934, 48 Stat. 944, excluding Section 516(b) from commodities subject to foreign trade agreements.

terests."[7] Since 1897, Congress has always provided a remedy to protect American industry from the unfair effects of foreign export subsidies by requiring an additional duty to countervail the amount of the subsidy. It is submitted that the decision below which carves out countervailing duty matters from Section 516(b) is repugnant to the very function of Section 516(b) which is

> . . . to extend to the American manufacturer, producer, or wholesaler the right to protest a classification of imported merchandise of a class and kind manufactured, produced, or sold at wholesale by him, and the rate of duty assessed thereon, if in his opinion such classification is wrong and the rate of duty assessed improper, because of his interest and concern in preventing unlawful competition in the markets of the United States by foreign producers of foreign products, resulting in injury to his business. *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* at 324.

It is difficult to conceive of an area more relevant to the prevention of "unlawful competition in the markets of the United States by foreign producers of foreign products" than that of countervailing duties offsetting the effects of foreign subsidies. But the court below has found such not to be the case.

The decision below for which review is sought is one of national importance, directly affecting the ability of American industry to protect itself from unfair trade practices. The importance of the question presented, the novelty of the issue, and the sparsity

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[7] H. Rep. No. 248, Part I, 67th Cong., 1st Sess. (1921), p. 26.

of authority relied upon by the court below are sufficient reasons to warrant review by this Court. In addition, the inability of the decision below to stand on its own rationale, its direct inconsistency with a prior decision of the United States Court of Appeals for the District of Columbia Circuit, and its indirect inconsistency with two prior decisions of this Court render this petition unusually ripe for exercise of this Court's judicial discretion to grant review.

A. The Rationale of the Court Below Is Without Judicial Support

Section 516(b) is an unambiguous grant of judicial review to American manufacturers, producers and wholesalers of decisions of the Secretary of the Treasury as to the classification or rate of duty of imported merchandise of a class or kind manufactured, produced, or sold at wholesale by them. Petitioner has contended that litharge imported from Mexico should be subjected to a countervailing duty under Section 303, and the Secretary of the Treasury has ruled to the contrary. T.D. 67-142. The court below in denying jurisdiction of Petitioner's protest has ruled that a countervailing duty is not a rate of duty under Section 516(b) and that the determination of the application of Section 303 is not classification under Section 516(b).

In concluding that a countervailing duty is not a rate of duty, the court below utilized the following syllogistic approach. Section 514, Tariff Act of 1930, permits review by importers of decisions of the collector "as to the rate and amount of duties chargeable, and as to all exactions of whatever character . . . ." There must be some exactions, other than rate of duty matters, within Section 514 and outside of Section

516(b). Such an exaction is a penalty, and a countervailing duty is penal in nature. The court below neglected to offer any support for the conclusion that a countervailing duty is a penal exaction.

Section 303 calls for an additional duty, not a penalty,[8] to be assessed upon dutiable articles which receive a bounty or grant from a foreign country upon their production, manufacture, or export. The additional duty is to be in the same amount as the foreign bounty or grant. It is evident that the additional duty is inextricably linked to the normal duty on the article. In the first place, countervailing duties are inapplicable to duty-free articles, thus demonstrating that Congress does not consider foreign bounties as reprehensible per se. Secondly, the additional duty is to be in the same amount as the bounty, in other words, it is to offset or countervail the bounty. Thus, the countervailing duty is no more penal than all customs duties, since its function is merely to restore the protective efficacy of the ordinary duty to the extent, and only to the extent, to which it has been eroded by a foreign bounty.

> When export bounties . . . either direct or indirect, are paid upon goods, such bounties neutralize more or less the duties that may be charged upon their importation into other countries and the protection thereby accorded. To reestablish the original amount of protection, the importing country may provide that articles upon which export bounties are paid a protective surtax shall be charged. Such a surtax is known as a countervailing duty. U. S. Tariff Commission, *Dictionary of Tariff Information* (1924), p. 205.

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[8] Congress is not reluctant to label a customs assessment as a penalty, *see*, 19 U.S.C. §§ 1304(e), 1341(b), 1445, 1453, 1454, 1460, 1464, 1497, 1510, 1520(a)(3), 1581, 1584, 1592, 1618.

There is simply no support for the proposition that a countervailing duty is a penal exaction.[9] The court's dicta evidences a feeling that a countervailing duty is a non-judicial matter, an area in which a court should not interfere with administrative decision-making. But, in truth, the customs courts have a long history of litigating countervailing duty matters, and as recently as 1966 overturned the position of the Treasury Department. *Energetic Worsted Corp.* v. *United States,* 53 C.C.P.A. 36, C.A.D. 874.

Although the court below deals somewhat with the issue of whether a countervailing duty is a rate of duty, it utterly ignored the question of whether the application or non-application of Section 303 was classification under Section 516(b). *Bradford Co. and U. S.* v. *American Lithographic Co., supra,* defined classification as

> . . . the process or act of grouping, or arranging merchandise into classes; it is a process which may be based upon the use to which the article has been dedicated, its commercial description, its similarity to other merchandise, the condition in which it is imported, and other equally important considerations, *the purpose of which is to determine what provisions of the tariff laws are applicable thereto.* (Emphasis added). 12 Ct. Cust. Appls. at 323.

For over thirty years this statement has represented the landmark definition for application of Section 516(b). Surely, determination of the application of

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[9] Section 618, Tariff Act of 1930, 19 U.S.C. § 1618, permits the remission of penalties by the Secretary of the Treasury. There is no known case where an importer assessed with a countervailing duty has ever considered such a duty subject to possible remission as a penalty.

Section 303—the existence of a foreign bounty or grant —falls within this rule. The court below assumed that classification was not present as Section 303 "relates to something apart from the physical characteristics of the imports." Of course, such a narrow view was expressly rejected by *Bradford,* and its imposition by the court below was arbitrary, without foundation, and contrary to the intent of Congress.

B. The Decision Below Conflicts With North American Cement Corporation v. Anderson, 284 F.2d 591 (D.C. Cir. 1960)

The issue before the courts below was the question of whether the failure of the Secretary of the Treasury to assess a countervailing duty was properly reviewable under Section 516(b). As stated previously, this is a novel question, so far as Section 303 is concerned. However, other authority does exist on the somewhat larger question, although directly on point, of the reviewability under Section 516(b) of the failure of the Secretary of the Treasury to assess additional duties—duties in excess of the rates found in the Tariff Schedules. On the one hand, there are those decisions under Section 304, the marking statute. These decisions, emanating from the customs courts, establish that the questions of whether goods are properly marked with the country of origin and the resulting additional duty of ten percent of its appraised value for improper marking constitute matters of classification and rate of duty under Section 516(b). *Bradford Co. and U. S.* v. *American Lithographic Co., supra; Diamond Match Co.* v. *United States, supra*

Another additional duty is the dumping duty found in the Antidumping Act of 1921. 19 U.S.C. § 160 *et seq.* This Act is designed to prevent goods from being

exported to the United States at a sales price below that which the goods are sold for in the country of origin. If the Secretary of the Treasury finds that such a condition exists, and the United States Tariff Commission determines that such sales injure or are likely to injure an American industry, then the Secretary is directed to impose a special duty equal to the selling price differential. The similarity between this additional duty and a countervailing duty is readily apparent. The court below, in fact, volunteered that the "dumping duty . . . falls in the same category as the foregoing, as a special duty, but it seems clear that, whether or not penal, the roles assigned to the Secretary of the Treasury and the Tariff Commission are such that bypassing [10] them in a 516(b) proceeding is out of contemplation."

In *North American Cement Corporation* v. *Anderson,* 284 F.2d 591 (D.C. Cir. 1960), this precise issue of the reviewability of dumping determinations was before the court. American cement manufacturers sought the Secretary of the Treasury to determine if cement imported from Norway was being sold in this country at less than fair value. Upon a negative determination by the Secretary, a cement manufacturer brought suit for declaratory and injunctive relief against the Secretary and the Commissioner of Customs. Faced with 28 U.S.C. § 1340 which excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court," the

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[10] The decision below repeatedly echoes the thought that Petitioner is "bypassing" the Secretary of the Treasury. But Section 516(b) is only instituted after a determination by the Secretary, so the Secretary is not bypassed. Petitioner only seeks review of a decision of the Secretary.

D.C. Circuit held that Section 516(b) provided a means of redress to the American manufacturer. *North American Cement Corporation* is totally irreconcilable with the decision below. This conflict of authority on an issue of such expansive import should be settled by this Court.

C. The Rationale Utilized by the Court Below To Support Its Decision Conflicts With Downs v. United States, 187 U.S. 496 (1903), and Nicholas & Co. v. United States, 249 U.S. 34 (1919)

As shown heretofore, the decision of the court below was dependent upon the conclusion that countervailing duties were penal exactions and not protective duties. Such a conclusion is entirely novel, and not only is it expressly refuted by the language of the statute itself, it also runs contrary to the analyses of countervailing duties made by this Court on the two occasions in which the statute has been before it. *Downs* v. *United States,* 187 U.S. 496 (1903); *Nicholas & Co.* v. *United States,* 249 U.S. 34 (1919). In both of these decisions, this Court read the statute in a protective vein, as a statute designed to equalize the effects of bounties on imports into our country. In *Nicholas,* the United States Court of Customs Appeals found that the "statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* (sic) in an equalization thereof to any extent directly or indirectly." 7 Ct. Cust. Appls. 97, 106, T.D. 36426 (1916).

On appeal, this Court affirmed stating in a similar tone that

> The statute was addressed to a condition, and its words must be considered as intending to define it,

> and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense, the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession,—the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise," a countervailing duty is required. . . . 249 U.S. at 39.

The decision below constitutes authority for the proposition that countervailing duties are penal exactions and not custom duties. This concept is the sine qua non for the result reached. However, such a rule is utterly novel, and specifically inconsistent with the prior pronouncements of this Court.

CONCLUSION

In applying the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, this Court has stated that there is no presumption against review of administrative action and in favor of administrative absolutism. *Data Processing Service* v. *Camp, supra; Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). Over twenty years prior to that Act, Congress recognized that American industry should be permitted to participate in the enforcement of customs laws which were largely enacted for their protection. And of all provisions in the law of customs it is difficult to imagine anyone more oriented toward the protection of American industry than the countervailing duty aimed at offsetting the pernicious consequences of foreign subsidies.

Yet the decision below states that countervailing duties are a matter solely delegated to administrative

discretion. The rationale is unique, based on assumption, and not law. It is submitted that such a decision with so great an effect upon domestic industry's self-protection in the complex arena of world trade should be dealt with by our nation's highest Court. This is especially true where this significant holding lacks any judicial precedent as support for its rationale, does not demonstrate a legislative design toward precluding review, conflicts with all judicial authority on point, both in the customs courts and in conventional federal courts, and casts doubt on previous pronouncements of this Court.

Respectfully submitted,

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